STATE OF MICHIGAN

COURT OF APPEALS

THAYER PROPERTIES LLC, d/b/a THAYER-MICHIGAN PROPERTIES, LLC, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED January 7, 2014
v	No. 312989 Van Buren Circuit Court
CITY OF SOUTH HAVEN, Defendant/Counter-Plaintiff-Appellee.	LC No. 11-610054-CH

Before: WHITBECK, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Plaintiff, Thayer Properties, LLC (Thayer), appeals as of right the trial court's order granting involuntary dismissal under MCR 2.504(B)(2) in favor of defendant, City of South Haven, on Thayer's action to quiet title. Because the trial court erred when it granted involuntary dismissal on the grounds that Thayer had not proved that South Haven "believed" that the property line was the true property line and that Thayer could not tack periods of acquiescence after the property was surveyed in 2008, we reverse and remand.

I. FACTS

A. BACKGROUND FACTS

The western edge of Thayer's property abuts Esplanade Street, a public right-of-way in South Haven. Chad VanHorn, an agent who helped Thayer purchase the property, testified that the property has been surrounded by a cement wall that extends about eight feet into the public right-of-way since at least 1935.

Fred Hunter, III, testified that Fred Hunter, Jr. purchased the property in 1966, when Fred Hunter, III, was 26 years old. According to Fred Hunter, III and Thomas Hunter, the Hunter family thought that the cement wall was the boundary line and treated the property and wall as their own by maintaining, insuring, and repairing it. When the Hunters and others drank alcoholic beverages outside of the home, police officers would ask them to stay inside the cement wall because alcohol was not allowed in the public right-of-way. Additionally, when South Haven's snowplow damaged the wall, Fred Hunter, III was told that South Haven would

not fix the wall because it was the Hunters' responsibility, since it was the Hunters' wall. Thomas Hunter testified that the Hunters paid taxes pursuant to the legal description on the parties' tax forms, but that they were unaware that the legal description did not include the wall.

In 1994, Fred Hunter, Jr. transferred the property to the Fred R. Hunter Revocable Trust (the Trust), and named his sons Fred Hunter, III and Thomas Hunter trustees. Fred Hunter, III testified that a survey in 2008 revealed that the western portion of the cement wall extended beyond the property's legal boundary. Nonetheless, in 2010, the Trust transferred the property to Jillian Investments, LLC, which in turn transferred the property to Thayer. VanHorn testified that Thayer was aware that the 2008 survey had revealed a discrepancy between the property's legal description and the location of the cement wall.

B. PROCEDURAL HISTORY

In June 2011, Thayer filed a complaint to quiet title to the property within the cement wall on the basis of acquiescence for the statutory period. On May 10, 2012, Thayer presented the above evidence at a bench trial. At the conclusion of Thayer's case in chief, South Haven moved for involuntary dismissal under MCR 2.504(B)(2). The trial court reasoned that

> . . . plaintiff has not really met their burden as to establishing that both sides knew that—or both sides believed that this was the property line. The fact that one side clearly believed it, lived there, whatever, the fact that the other side, which happens to be a political entity who has the burden of taxing and being accurate and filing things, the fact that they continued to tax the property based on the property line is probably enough, but I think beyond that the Plaintiff must prove that . . . there was a line, a legal line, that existed. Neither side really knew what that was and believed the fence to be the line, okay, and I just don't think there is enough proof that the City simply believed it was.

The trial court further reasoned that

> there is another problem with the case and that is the principle of legal tacking. Legal tacking requires that . . . they can prove that all of the elements existed for the prior owner and all of the elements exist for the new owner and that if you tack these together, you'd have the necessary time period.
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> In this particular case if we view the Plaintiff's case of meeting all the elements with the Hunter ownership and even the Trust ownership, the element . . . that the owners believed it was the line, arguably they have met all the elements, but when the property—in 2008, Mr. Hunter, one of the Trustees, knew . . . that there was a legal line and he took no action whatsoever to do anything about it.

Accordingly, the trial court granted South Haven's motion for involuntary dismissal.

II. ACQUIESCENCE

A. STANDARD OF REVIEW

Actions to quiet title on the basis of acquiescence are equitable in nature.[1] This Court reviews for clear error the trial court's factual findings supporting a determination in favor of involuntary dismissal of an equitable action, and we review de novo the trial court's ultimate determination.[2] A finding is clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake.[3]

B. LEGAL STANDARDS

Involuntary dismissal is appropriate when, after the close of a plaintiff's case in chief during a bench trial, "on the facts and the law, the plaintiff has no right to relief."[4] Acquiescence applies when adjoining property owners "are mistaken about where the line between their property is."[5] "It has been repeatedly held . . . that a boundary line long treated and acquiesced in as the true line, ought not be disturbed on new surveys."[6] The three theories of acquiescence are "(1) acquiescence for the statutory period; (2) acquiescence following a dispute and agreement; and (3) acquiescence arising from intention to deed to a marked boundary."[7]

C. MUTUAL AGREEMENT ON A BOUNDARY

Thayer contends that the trial court erred when it granted South Haven's motion for involuntary dismissal on the basis that Thayer had not established that South Haven "believed" that the cement wall was the property line. We agree.

"[A]cquiescence is established when a preponderance of the evidence establishes that the parties *treated* a particular boundary line as the property line."[8]

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[1] MCL 600.2932(5); *Sackett v Atyeo*, 217 Mich App 676, 680; 552 NW2d 536 (1996).

[2] *Id*.; *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

[3] *Peters v Gunnell, Inc*, 253 Mich App 211, 221; 655 NW2d 582 (2002).

[4] MCR 2.504(B)(2); *Id*.

[5] *Kipka v Fountain*, 198 Mich App 435, 438; 499 NW2d 363 (1993).

[6] *Johnson v Squires*, 344 Mich 687, 692; 75 NW2d 45 (1956), quoting *Dupont v Starring*, 42 Mich 492, 494; 4 NW 190 (1880).

[7] *Sackett*, 217 Mich App at 681.

[8] *Mason v City of Menominee*, 282 Mich App 525, 529-530; 766 NW2d 888 (2009), quoting *Walters* v *Snyder*, 239 Mich App 453, 458; 608 NW2d 97 (2000) (emphasis in original). See *Sackett*, 217 Mich App at 681.

The trial court erred when it determined that Thayer had to prove that the property line was the legal property line and found that the tax documents indicated that the property line was not the legal line. The doctrine of acquiescence is based on a *difference* between the legal property line and a boundary that the parties treat as the property line.[9] Thayer only had to prove that both parties were mistaken about the location of the real property line and *treated* the cement wall as a property line for the statutory period.

Additionally, the trial court erred to the extent that the trial court concluded that Thayer had to prove what South Haven "believed" about the property line. We recognize that a unilateral mistake does not constitute acquiescence by agreement.[10] For instance, in *Kipka v Fountain*, the plaintiff treated a retaining wall on the defendant's property as the boundary was not the property's boundary line.[11] However, the defendant was not mistaken concerning the line, did nothing to treat the wall as the boundary, and clearly informed the plaintiff that the wall was not the property line.[12] In that case, what the defendant and plaintiff thought was relevant because the facts showed that neither the defendant nor the plaintiffs were mistaken about the property line, regardless of how the plaintiff had treated a retaining wall on the defendant's property.[13] However, no case holds that the plaintiff must prove the defendant's subjective belief about the property line.

Thayer presented evidence that agents of South Haven informed the Hunters (1) to drink within the cement wall so as not to be drinking in the right of way, and (2) that any damage to the wall was theirs to repair because they owned it. Thayer also presented evidence that the Hunters thought that the location of the property line was the cement wall, and that they treated the wall as the property line by repairing and maintaining it and the property inside it. This evidence supports both of the elements of acquiescence that the trial court found that Thayer did not prove in its case in chief—that Thayer and South Haven were mistaken about the location of the property line, and that the mistake was mutual. Thus, we are definitely and firmly convinced that the trial court made a mistake when it found that Thayer's case was factually deficient concerning the elements of acquiescence.

To the extent that the trial court ruled that Thayer did not present sufficient evidence of acquiescence, we conclude that the trial court clearly erred. And to the extent that the trial court granted involuntary dismissal on the basis of the property line's legal description and the parties' subjective beliefs, the trial court erred because these are not elements of acquiescence. Thus, we conclude that the trial court erred by granting involuntary dismissal.

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[9] *Johnson*, 344 Mich at 692.

[10] *McGee v Eriksek*, 51 Mich App 551, 557; 215 NW2d 571 (1974).

[11] *Kipka*, 198 Mich App at 437.

[12] *Id*.

[13] See *Id*. at 438-439.

D. THE SURVEY

Thayer contends that the trial court erred by determining that the Hunters' 2008 survey prevented it from proving acquiescence for the necessary time period. We agree.

"[T]he acquiescence of predecessors in title can be tacked on that of the parties, and if the whole period of acquiescence exceeds 15 years, the line becomes fixed . . . ."[14] The theory of acquiescence is not based on the plaintiff's ability to enforce the new property line, it is based on the defendant's inability to enforce the old property line.[15]

For instance, in *Sackett v Atyeo*, the plaintiffs and the defendants' predecessors mistakenly treated the center of a driveway as a boundary from 1963 to 1989.[16] A survey in 1972 revealed that the driveway was actually located on the property of the defendants' predecessors.[17] Consistent with the survey, when the defendants purchased the property in 1990, the defendants thought that they owned the entire driveway and treated the entire driveway as their own.[18] However, because the parties treated the center of the driveway as the property line for more than 15 years, it had already become the new boundary.[19]

Tacking as it pertains to the doctrine of acquiescence simply means that a party may apply his predecessor's treatment of a property line when determining whether acquiescence has existed for the statutory period.[20] Thus, the existence of a survey—in absence of evidence that it changed how the parties treated the line during the statutory period—does not invalidate acquiescence. If South Haven treated the wall as the boundary for 15 years before 2008, the boundary would already be fixed at the cement wall.

We conclude that the existence of the 2008 survey, without some evidence that it changed how the parties treated the boundary within the statutory period, does not prevent Thayer from tacking acquiescence. Thus, the trial court erred by granting involuntary dismissal in favor of South Haven on the basis of the 2008 survey.

III. CONCLUSION

We conclude that the trial court erred by requiring Thayer to prove that South Haven believed that the property line was the cement wall and that the cement wall was the legal

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[14] *Johnson*, 344 Mich at 692.

[15] *Kipka*, 198 Mich App at 439.

[16] *Sackett*, 217 Mich App at 682.

[17] *Id*.

[18] *Id*. at 679.

[19] *Id*. at 682.

[20] *Jackson v Deemar*, 373 Mich 22, 26; 127 NW2d 856 (1964); *Johnson*, 344 Mich at 692.

property line, and erred by concluding that the 2008 survey prevented Thayer from "tacking" acquiescence. We conclude that the trial court clearly erred by finding that Thayer did not present sufficient evidence of the elements acquiescence. The grounds stated by the trial court do not support its ruling on involuntary dismissal. Thus, we reverse the trial court's order granting involuntary dismissal, and remand for further proceedings.

We reverse and remand. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher